

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
HAWKINS, : Docket # 1:13-cv-05434-
 : ALC-SDA
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Plaintiff, :
 :
- against - :
 :
MEDAPPROACH HOLDINGS, INC., et al., : New York, New York
 : February 27, 2023
Defendants. :
 : TELEPHONE CONFERENCE
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PROCEEDINGS BEFORE
THE HONORABLE ANDREW L. CARTER, JR.,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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For Defendants: GOODWIN PROCTER, LLP
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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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2 THE CLERK: Civil call for telephonic
3 conference in case number 13-cv-5434, Hawkins vs.
4 Medapproach.

5 Counsel, please state your appearance for the
6 plaintiff.

7 MR. R. SCOTT THOMPSON: Good morning. It's
8 Scott Thompson of Wollmuth Maher & Deutsch on behalf of
9 the plaintiff, Sharon Hawkins.

10 THE CLERK: And for the defendants?

11 MR. JEFFREY A. SIMES: Good morning. This is
12 Jeff Simes of Goodwin Procter representing the
13 defendants, Medapproach Holdings, Inc., and Bradley
14 Daniel.

15 MR. VIKTORS M. DINDZANS: Good morning. This
16 is Viktors Dindzans of Goodwin Procter, also on behalf
17 of defendants.

18 HONORABLE ANDREW L. CARTER, JR. (THE COURT):
19 Okay. Good morning. During today's conference I will
20 announce an oral opinion regarding the bench trial
21 conducted before me in April 2022. This opinion
22 constitutes my findings of fact and conclusions of law
23 after trial pursuant to Federal Rule of Civil
24 Procedure 52(a). In short, I find for defendants and
25 deny plaintiffs all relief.

I assume the parties' familiarity with the procedural background of this case, but I'll highlight a few important dates that are relevant to today's decision. The lawsuit was initiated on August 2, 2013. On July 29, 2020, I entered an opinion and ordered dismissing or granting summary judgment for all claims except plaintiff's Count VIII claims against Brad Daniel from the Third Amended Complaint. In relevant part, Count VIII claims that certain 2016 and 2017 payments to Mr. Daniel were unauthorized payments not in the interests of ND Management, derivatively on behalf of Medapproach and through Medapproach on behalf of NDM. Ms. Hawkins seeks damages and disgorgement alleging the payments to Mr. Daniel in 2016 and 2017, totaling \$431,817.52 for consulting and contract labor were in violation of the duty of loyalty under Delaware law. In the summary judgment opinion I wrote that defendants had not shown that the plain language of the Indemnification Agreement and Certain Compensation Matters Agreement unambiguously entitled Mr. Daniel to the 2016 and 2017 fees; therefore, summary judgment was not proper.

The parties then commenced a two-day bench trial which was held on April 7, 2022, and May 18, 2022. Following the bench trial I find that defendants have

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met this burden. The record, along with the testimony and evidence presented at trial shows that Mr. Daniel followed the parties' agreements and was paid an amount contemplated within those contracts. The payments at issue were fair, both in terms of how they were approved and in the amount paid. Undisputed evidence that plaintiff approved the compensation agreements means there is no need to consider the fiduciary duty analysis. It is a contractual question in which there is no dispute as to the validity of the contract or that the parties agreed to it.

Findings of Fact: Defendant Medapproach is a Delaware limited partnership that is one of the web of entities involved in the project. Its general partner is Medapproach Holdings, which is owned and controlled by W. Bradley Daniel; MDM is 75% owned by Medapproach. Plaintiff, Sharon Hawkins, is a limited partner of Medapproach holding 88.18% of the shares therein. She is the successor-in-interest to her husband, Gregory D. Hawkins. Though Mr. Hawkins transferred his interest in Medapproach to Mrs. Hawkins, he has acted as an agent for Mrs. Hawkins and conducted discussions about the project on her behalf. Mr. Hawkins has remained involved in managing the investment in Medapproach for

1
2 Mrs. Hawkins.

3 The payments made to Mr. Daniel at issue in
4 plaintiff's remaining claim total \$431,817.52. MDM made
5 the payments at issue to Mr. Daniel over the course of
6 2016 and 2017 to compensate him for services rendered
7 from the initiation of this lawsuit in August 2013
8 through the end of 2017. The payments to Mr. Daniel
9 were pursuant to an August 1, 1998, Indemnification
10 Agreement. The Indemnification Agreement states in
11 recital F that the enterprise project believed that it
12 is in its best interest to retain the proxyholders and
13 to find, attract and retain qualified management
14 personnel for the enterprise and that it must enter into
15 this agreement and provide the indemnification
16 protection hereunder to such individuals in order to
17 attract and retain such qualified people. The
18 Indemnification Agreement designates W. Bradley Daniel,
19 Brian M. Freeman and Jeffrey L. Rush as proxyholders
20 under the agreement. The Indemnification Agreement
21 indemnifies Medapproach in its capacity as a stockholder
22 of the general partner NDM; the proxyholders; the
23 directors; officers; employees; agents of any of the
24 enterprise entities or their affiliates; and respective
25 heirs, personal representatives, successors, assigned,

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2 partners, employees and agents of each of the foregoing,
3 all of whom are defined as the indemnitees under the
4 agreement.

5 The Indemnification Agreement states that the
6 payments which the indemnitor shall be obligated to make
7 hereunder shall include, without limitation,
8 compensation for time spent by a proxyholder in
9 attending to or dealing with an indemnified claim or
10 claims at the per diem rates set forth in that certain
11 letter agreement dated May 1998 by and among the general
12 partner, the proxyholders and Medapproach.

13 The May 1998 agreement referenced in the
14 Indemnification Agreement is the May 31, 1998, Certain
15 Compensation Matters Agreement that addresses certain
16 aspects of the proxyholders' compensation from the
17 project. The relevant agreements were approved by then
18 majority owner of Medapproach, Gregory Hawkins, the
19 husband and predecessor-in-interest of plaintiff, Sharon
20 Hawkins. The Indemnification Agreement was reviewed and
21 approved by Mr. Hawkins prior to execution. It was
22 Mr. Daniel's consistent practice to seek Mr. Hawkins'
23 approval of agreement affecting the project. The
24 Certain Compensation Matters Agreement to which the
25 Indemnification Agreement refers was also negotiated and

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2 approved by Mr. Hawkins. Mr. Hawkins signed a letter at
3 the time, May 28, 1998, acknowledging that he reviewed
4 and approved the Certain Compensation Matters Agreement.

5 The Certain Compensation Matters Agreement
6 states that Mr. Daniel's proxyholder fee is in respect
7 of routine management services provided by Daniel to the
8 general partner and for service as a
9 director/proxyholder. Mr. Daniel was not expected to
10 work full time for the project or for Medapproach.
11 Nothing herein shall require the general partner or any
12 of its principals or officers to devote full time or any
13 material proportion of their time to the partnership.
14 The Indemnification Agreement provides that the rate of
15 payment for time spent by a proxyholder on litigation is
16 at the per diem rate set forth in the Certain
17 Compensation Matters Agreement. Paragraph Two of the
18 Certain Compensation Matters Agreement lists per diem
19 rates of \$2,500 per day for Dr. Rush and \$3,000 per day
20 for Mr. Freeman.

21 Mr. Daniel's ordinary-course compensation was
22 not by means of a per diem rate but through an annual
23 proxyholder fee. The Indemnification Agreement provides
24 for compensation for time spent by a proxyholder on
25 litigation. Mr. Daniel as a proxyholder was an intended

indemnatee under the Indemnification Agreement and was therefore entitled to compensation for time spent on litigation also. The payments that Mr. Daniel received under the indemnity were approved by Dr. Jeffrey Rush, the vice president of NDM and a fellow proxyholder.

Mr. Daniel initially deferred submitting his time records for payment, as the agreement did not require an accounting of time spent attending the litigation. Eventually, Mr. Daniel discussed with Dr. Rush NDM's indemnity obligations and how payments should be calculated. In meetings taking place in April and May 2015, for example, Mr. Daniel reiterated to Dr. Rush that Mr. Daniel was recording his time and would soon need to have NDM compensate him for it. Mr. Daniel and Dr. Rush discussed converting the per diem rates in the Certain Compensation Matters Agreement into hourly rates and agreed that that was the most reasonable and fair approach. Ms. Van Vranken and the project's outside accountants, KraftCPAs, reviewed the payments to Mr. Daniel for accuracy. The rate was then adjusted for inflation, as with all compensation of the project, under Section 15(d) of the Danco Partnership Agreement. The use of a CPI increase was a common practice at the firm, as Ms. Van Vranken testified. She testified that,

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"CPI increase is calculated on all of the management fees and on our staff increases; that's our standard business practice." Inflation adjustments and confirmation of the calculation of amounts due was performed by the project's outside accountants, KraftCPAs.

Conclusions of Law: The parties agree that Delaware law governs the parties' relationship and evaluations of plaintiff's claims. The payments to Mr. Daniel were explicitly contemplated in the Indemnification Agreement and the payments made to him were calculated based on the terms of agreements that Mr. Hawkins approved. The Delaware Supreme Court has held that, "There can be no breach of a fiduciary duty where the subject of the claim is expressly addressed by contract." See *Nemec v. Shrader*, 991 A. 2d, 1120 at 1129 Delaware (2010). When parties cover a particular subject in an express manner, their contractual choice governs and cannot be supplanted by the application of inconsistent fiduciary duty principles that might otherwise apply as a default.

The evidence presented shows that the parties contracted for indemnity in relation to time spent on litigation for Mr. Daniel. The Indemnification

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Agreement defines Mr. Daniel as one of the proxyholder in Recital D. By virtue of certain irrevocable proxies given by Mr. Pike and Medapproach, the general partner is in effect managed by or under the direction of three individuals: W. Bradley Daniel, Brian M. Freeman, and Jeffrey L. Rush, collectively "the proxyholders." The agreement then indemnifies the proxyholders for time spent in attending to or dealing with litigation in relation to their work (at Section 2). "The payments which the indemnitors shall be obligated to make hereunder shall include, without limitation, compensation for time spent by a proxyholder in attending to or dealing with such claim or claims as the per diem rates set forth in the Certain Compensation Matters Agreement."

When the Indemnification Agreement wished to specifically carve an individual out, it did so. See the Indemnification Agreement, Section 2, stating that, "In no event would Joseph Pike or individuals related to him be indemnified." Mr. Daniel was designated as a proxyholder and thus was entitled to indemnification as defined in the agreement.

The 2016 and 2017 fees were calculated using relevant information from the Certain Compensation

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Matters Agreement approved by a disinterested director in Dr. Jeffrey Rush and then adjusted for inflation per the project's standard practice and a relevant Operating Agreement. This calculation was then reviewed by the project's CFO and its outside accountants for accuracy. Because the payments at issue were explicitly contemplated in the Indemnification Agreement, I do not consider plaintiff's fiduciary duty claims. For the reasons stated above, plaintiff's claims are denied. That is the ruling of the Court. We are adjourned. Thank you.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Hawkins v. Medapproach Holdings, Inc. et al, Docket #13-cv-05434-ALC-SDA, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: March 27, 2023